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IN THE SUPREME COURT OF OHIO

OCTOBER TERM, 1948

No. 31081

UNITED STATES GYPSUM COMPANY,
Appellant,

vs.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO,
Appellee

JURISDICTIONAL STATEMENT

United States Gypsum Company, appellant in the above entitled cause and applicant for the allowance of an appeal to the Supreme Court of the United States from the Supreme Court of Ohio, respectfully represents that the basis upon which appellant contends that the United States Supreme Court has jurisdiction upon appeal to review the final judgment herein is as follows:

I

The Statutory Provision Believed to Sustain the Jurisdiction

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Title 28, United States Code, Section 1257 (Public Law No. 773—

80th Congress, Second Session), which section reads in part as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • • • • • •
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

There is drawn in question in this suit the validity of statutes of the State of Ohio on the ground of repugnancy to the Constitution of the United States. The decision of the Supreme Court of Ohio, which is the highest court of Ohio in which a decision in this suit could be had, was in favor of the validity of such statutory provisions.

II

The Statutes of the State, the Validity of Which Are Involved

The statutes of the State of Ohio, the validity of which are involved, and which have been sustained by the final judgment of the Supreme Court of Ohio, as not being repugnant to the Constitution of the United States, are Sections 5328-1 and 5328-2 of the General Code of Ohio.[1]

These statutes as construed and applied by the Supreme Court of Ohio authorize and require the assessment and taxation, by an *ad valorem* property tax, of the accounts

[1] There is no official edition of the General Code of Ohio, Sections 5328-1 and 5328-2, General Code of Ohio, appear on pages 17, 18, and 19 of Page's Ohio General Code Annotated, Volume 4-A; and at page 9, Throckmorton's Ohio Code Annotated, Volume 1, Part Second, 1940 Edition.

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receivable of appellant, a non-resident of Ohio, having no actual or business situs in the State of Ohio. The pertinent statutory provisions are as follows:

> "Section 5328-1 . . . Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, . . . shall be subject to taxation; and all such property of persons residing in this state used in and arising out of business transacted outside of this state by, for or on behalf of such persons, . . . shall not be subject to taxation. . . .
>
> • • • • • • •
>
> "Section 5328-2. Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:
>
> "In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state.
>
> • • • • • • •
>
> "The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section

is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances. If any provision of this section shall be held invalid as applied to property of a non-resident person, such decision shall be deemed also to affect such provision as applied to property of a resident, but shall not affect any other provision hereof."

III

Date of Judgment and Date of Application for Appeal

The date of judgment of the Supreme Court of Ohio which is sought to be reviewed is August 4, 1948. An application for rehearing, subsequently filed within the time allowed by law and considered by the Supreme Court of Ohio, was denied by that court on October 6, 1948. The judgment herein thereupon became final for the purpose of appeal and review by the Supreme Court of the United States on October 6, 1948.

Department of Banking v. *Pink,* 317 U. S. 264, 266.

The date on which the application for appeal is presented is December 23, 1948.

IV

Nature of the Case and Rulings of the Supreme Court of Ohio

The nature of the case and the rulings of the Supreme Court of Ohio deemed to bring the case within the jurisdictional provisions relied on are as follows:

The controversy out of which this suit arose concerns the action of the Tax Commissioner of Ohio, the appellee herein, in ascribing an Ohio situs to certain accounts receivable of appellant, an Illinois corporation, for the years 1942 and 1943, and assessing personal property taxes against

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appellant for those years on account thereof. Appellant objected to such assessments in the time and manner provided by law, and at the hearing before the appellee urged the constitutional objections now in issue. In affirming the assessments on November 17, 1944, the appellee ruled that as to such constitutional issues he had no authority to set aside acts of the legislature on constitutional grounds. A copy of the Order of the Tax Commissioner is appended hereto as Exhibit "A".

Appellant then appealed to the Board of Tax Appeals of Ohio in the time and manner provided by law, again drawing in question the validity of the statutes upon the authority of which the assessments were based, on the ground of repugnancy to the Fourteenth Amendment of the Constitution of the United States. In affirming the assessments on April 10, 1947 the Board of Tax Appeals held that it had "no right to declare a statute unconstitutional." A copy of the entry of the Board of Tax Appeals is appended hereto as Exhibit "B".

Appellant then appealed to the Supreme Court of Ohio in the time and manner provided by law, including in its notice of appeal and assignment of errors the following:

> "7. The Board erred in failing to hold that Sections 5328-1 and 5328-2 of the Ohio General Code, to the extent that they authorize or permit such accounts receivable of appellant to be taxed in Ohio as personal property, are in violation of the 'due process' clause of the Fourteenth Amendment of the Constitution of the United States, . . . and are therefore invalid.
>
> "8. The Board erred in failing to hold that Sections 5328-1 and 5328-2 of the Ohio General Code, to the extent that they authorize or permit such accounts receivable of appellant to be taxed in Ohio as personal property are in violation of that clause of the Fourteenth Amendment of the Constitution of the United

States guaranteeing the appellant equal protection of the laws, . . . and are therefore invalid."

The Supreme Court of Ohio affirmed the decision of the Board of Tax Appeals on August 4, 1948, the court holding that the statutes, as construed and applied by the appellee, are not repugnant to the due process and equal protection of laws clauses of the Fourteenth Amendment of the Constitution of the United States. Appellant thereafter on August 18, 1948 filed its application for rehearing, which was denied October 6, 1948. The Supreme Court of Ohio decided appellant's case at the same time, and in the same opinion, that it decided four companion cases, Nos. 31037 and 31079 (also involving the statutes imposing *ad valorem* taxes on intangibles), and Nos. 31038 and 31080, involving the statutes imposing franchise taxes based upon the inclusion of such intangibles as Ohio property in the computation of the tax. The four companion cases, one of which involved a franchise tax assessment against this appellant, involved like constitutional issues under facts having a broad general similarity. A copy of the opinion of the Supreme Court of Ohio is appended hereto as Exhibit "C".[2]

It will be observed that in its opinion of August 4, 1948, the Supreme Court of Ohio discussed the constitutional issues only in that portion of the opinion dealing with one of such companion cases decided at the same time and by the same opinion. In order to clarify its holding on the constitutional issues as to the appellant in this case the Supreme Court of Ohio, on November 10, 1948, entered and filed as a part of the record herein its certificate that in appellant's notice of appeal to the Supreme Court of Ohio the validity of Sections 5328-1 and 5328-2 of the General Code of Ohio was drawn in question, upon the grounds that

[2] (Clerk's Note.—The Opinion of the Supreme Court of Ohio is printed as Exhibit "D" in the Statement as to Jurisdiction No. 493 and is not reprinted here.)

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such statutory provisions, to the extent that they authorized or permitted appellant's accounts receivable to be taxed in Ohio as personal property, are unconstitutional in that they deprive appellant of its property without due process of law, and deny appellant the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States; and further, that the question as to the validity of such statutory provisions was urged upon the Supreme Court of Ohio in briefs and arguments of counsel, that the determination of the constitutionality of said statutes was necessary to a decision of the case, and that the Supreme Court of Ohio decided in favor of the validity of said statutes. A copy of said certificate of the Supreme Court of Ohio is appended hereto as Exhibit "D".

As shown by its opinion referred to above, and in its certificate filed in this case, the Supreme Court of Ohio held that as applied by the appellee herein Sections 5328-1 and 5328-2 of the General Code of Ohio are valid and are not repugnant to the due process and equal protection of laws clauses of the Fourteenth Amendment of the United States Constitution.

V

Cases Believed to Sustain the Jurisdiction of the United States Supreme Court to Review the Judgment of the Supreme Court of Ohio on Appeal.

In cases decided by the United States Supreme Court where the question has been as to the validity of a state taxing statute (including statutes imposing *ad valorem* taxes), and the decision of the state court has been in favor of its validity, the review has been by way of appeal from the judgment of the state court.

Wheeling Steel Corporation v. *Fox*, 298 U. S. 193 (1936);

First Bank Stock Corp. v. *Minnesota*, 301 U. S. 234 (1937);
Madden v. *Kentucky*, 309 U. S. 83 (1940);
Butler Bros. v. *McColgan*, 315 U. S. 501 (1942).

See also:

Charleston Federal Savings & Loan Assn. v. *Alderson*, 324 U. S. 182 (1945).

VI

The Questions Involved Are Substantial

1. *Statutory Provisions and Issues*

The central issue in this case involves the jurisdiction of the State of Ohio to impose an *ad valorem* property tax on intangibles of a non-resident in the absence of a domiciliary situs or a business situs in Ohio. The issues raised by this case are of the broadest import and application, and if the decision of the Supreme Court of Ohio is not reversed, will result in a complete reversal of the doctrine of situs of intangibles for property tax purposes as heretofore established by the decisions of the Supreme Court of the United States.

The Tax Commissioner of Ohio, appellee herein, determined that as of the first days of January of each of the years 1942 and 1943 appellant owned notes and accounts receivable taxable in Ohio, and imposed taxes thereon as follows:

	Receivables	Tax Assessed
1942	$965,850.00	$2,897.55
1943	695,750.00	2,087.25

These additional assessments and taxes were imposed under the purported authority of Sections 5328-1 and 5328-2

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of the General Code of Ohio. Section 5328-1 provides that property of the kinds and classes mentioned in Section 5328-2 (which includes notes and accounts receivable)

> "*used in and arising out of* business transacted in this state by, for or on behalf of a nonresident person, . . . shall be subject to taxation; and all such property of persons residing in this state *used in and arising out of* business transacted outside of this state by, for or on behalf of such persons, . . . shall not be subject to taxation." (Italics supplied.)

This is the only section of the General Code of Ohio which taxes or exempts intangible property from taxation. Some of the terms used in Section 5328-1 are defined in other sections. Thus Section 5325-1 defines "used in business," as well as "used" and "business," as follows:

> "Within the meaning of the term 'used in business,' occurring in this title, personal property shall be considered to be 'used' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, . . . Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

The complete phrase, "used in . . . business transacted in this state," which appears in Section 5328-1 quoted above, is not defined by Section 5325-1 or by any other statutory provision.

Section 5328-2 of the General Code of Ohio sets forth the circumstances under which accounts receivable shall be

deemed to *arise* out of business transacted in Ohio, as follows:

> "Property of the kinds and classes herein mentioned, when used in business, shall be considered to *arise* out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:
>
> "In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state." (Italics supplied.)

Appellant contends that under the uncontroverted facts in this case it is abundantly clear that appellant's receivables have neither a domiciliary situs nor a business situs in Ohio. In rendering its decision the Supreme Court of Ohio held that, even though the goods (with minor exceptions) were manufactured from day to day only to fill orders previously received and were shipped immediately thereafter, the sales were nevertheless from a "stock of goods" within the meaning of Section 5328-2 of the General Code of Ohio, and therefore taxable. However, the subject matter of the tax imposed under the purported authority of Sections 5328-1 and 5328-2 is the receivables themselves, and not the goods from the sale of which the receivables arose.

2. *Appellant's Contentions.*

(a) Appellant contends that where, as here, the receivables had no domiciliary situs or business situs in Ohio, jurisdiction to tax is wholly lacking, with the result that Sections 5328-1 and 5328-2 of the General Code of Ohio, as construed and applied, are repugnant to the due process

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clause of the Fourteenth Amendment of the Constitution of the United States.

(b) Appellant contends that Sections 5328-1 and 5328-2 of the General Code of Ohio deny to appellant the equal protection of the laws guaranteed to it by the Fourteenth Amendment of the Constitution of the United States in that, under the statutes as construed and applied, the mere circumstance of residence or non-residence in Ohio determines the question of taxability in Ohio.

3. *Facts*

The essential facts in this case, which were stipulated in part and in part based on the testimony of witnesses, are not in dispute and, to the extent covered by the stipulation of facts, are summarized by the Supreme Court of Ohio as follows:

> "This company is an Illinois corporation with its principal office in the city of Chicago. It is engaged in the manufacture and sale of gypsum products and many other building materials. It owns and operates numerous plants in the United States and Canada. Five of them are located in Ohio. All corporate and business activities are conducted at the Chicago office where meetings of the directors, shareholders and executive committee are held. All corporate records, general books and accounting records are kept there. All payroll checks are prepared and signed there and are drawn on funds there and in Ohio. Sales are managed and directed through divisional and district sales offices. Two district offices are located in Ohio. Orders taken by salesmen are subject to acceptance or rejection at the Chicago office. All invoices for products sold to customers in Ohio or shipped from Ohio plants are prepared and issued in Chicago, except in a few instances when shipments are invoiced from New York or Los Angeles; and all such invoices are posted in the accounts receivable ledgers of the company in Chicago

> or Los Angeles where they are payable. Checks received in payment of such accounts are deposited by the receiving office in various banks throughout the United States, and such deposits are under the exclusive control of the Chicago office and are used and applied indiscriminately to the general purposes of the company's business in Ohio and elsewhere."

In addition to the facts summarized above, the record discloses that all of appellant's products (with minor exceptions) are manufactured only to fill orders already in hand and are not manufactured for stock or inventory purposes at any time, plant output fluctuating from day to day with the volume of orders. The bulk character of the products in question necessitates immediate shipment, no provision being made in appellant's plants for warehousing or storing of completed products, and railroad switch tracks and other loading facilities being located in close proximity to the actual end point of the manufacturing processes to facilitate immediate loading and shipment without rehandling. The function of carrying or maintaining a stock of goods in this industry is performed by the building material dealer, who normally purchases in carload lots and carries such stocks to fill day to day requirements of the contractor or other consumer or user of such products.

4. *The Law Believed Applicable*

A. The statutes in question as applied are repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

1. The power to impose an ad valorem tax, whether on tangibles or intangibles, is limited to property within the territorial jurisdiction of the State, and it is axiomatic that the State is wholly lacking in power to tax property not within its territorial jurisdiction.

Louisville, etc. Ferry Co. v. *Kentucky,* 188 U.S., 385 (1903);

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Delaware, Lackawanna & Western R. R. Co. v. *Pa.*, 198 U.S. 341 (1905);
Union Refrigerator Transit Co. v. *Kentucky*, 199 U.S., 194 (1905);
Buck v. *Beach*, 206 U.S., 392 (1907);
Wheeling Steel Corp. v. *Fox*, 298 U.S., 193 (1936);
51 Am. Jur., *Taxation*, Section 59.

With respect to intangibles, the location or situs for tax purposes is the owner's domicile, following the maxim *mobilia sequuntur personam* (*Wheeling Steel Corp.* v. *Fox*, 298 U.S., 193 (1936); 51 Am. Jur., *Taxation*, Section 463), unless the intangibles have acquired a *business situs* in another state (*Wheeling Steel Corp.* v. *Fox*, 298 U.S., 193 (1936); *Newark Fire Ins. Co.* v. *State Board of Tax Appeals, et al.*, 307 U.S., 313 (1939)).

2. Appellant's accounts receivable have neither a domiciliary nor a business situs in Ohio and therefore are not within the territorial jurisdiction or taxing power of the State of Ohio.

Lack of a domiciliary situs is not controverted. Intangibles only acquire a business situs in a state other than the domicile of the owner when the owner conducts a localized, or separate, semi-independent or self-contained business in such state and the intangibles are so connected with and used in such localized business as to become an integral part thereof. (*Wheeling Steel Corp.* v. *Fox*, 298 U.S., 193 (1936); *Newark Fire Ins. Co.* v. *State Board of Tax Appeals*, 307 U.S., 313 (1939).)

In the leading case of *Wheeling Steel Corp.* v. *Fox*, 298 U.S. 193 (1936), the United States Supreme Court, after citing a number of earlier cases applying the business situs doctrine, said at page 210:

> "These cases, we said in *Farmers Loan and Trust Co.* v. *Minnesota, supra*, p. 213, 'recognize the principle

> that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business.' "

The necessity of finding a localized use of the intangibles sufficient to make them an integral part of the localized business as a basis for taxation outside the domiciliary situs, was reaffirmed by the United States Supreme Court in *Newark Fire Ins. Co.* v. *State Board of Tax Appeals,* 307 U.S. 313 (1939). In that case the court, after adverting to the rule of *mobilia sequuntur personam,* said at pages 319-21:

> "There are occasions, however, when the use of intangible personalty in other states becomes so inextricably a part of the business there conducted that it becomes subject to taxation by that state. . . .
>
> "Where consideration has been given to the existence of a business situs of intangibles for taxation by a state other than the state of domicile, there has been definite evidence that the intangibles were integral parts of the business conducted. . . .
>
> ". . . To overcome the presumption of domiciliary location, the proof of business situs must definitely connect the intangibles as an integral part of the local activity."

From the facts in this case, with respect to which there is no dispute, appellant contends that there is nothing to connect its receivables with a localized business in Ohio. A finding of business situs must be based upon evidence, and where constitutional rights are affected it is the province of the Supreme Court of the United States to inquire into such evidence. (*Beidler* v. *South Carolina,* 282 U.S. 1). The record discloses that appellant solicits orders in Ohio for acceptance or rejection in *Illinois,* and carries on manufacturing operations at several locations in Ohio, but that is all. Its sales of products to be manufactured, its

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corporate proceedings, its accounting, its collections, and all the various steps or processes necessary to complete the conduct of a business are localized in Illinois. The accounts receivable, which originate from sales of products manufactured in Ohio and sold in many States, are not integrated, even in the slightest degree, with appellant's activities in Ohio. They do not arise out of contracts made in Ohio and their creation is controlled exclusively in Illinois. They are put to no use anywhere excepting to be collected and their collection, as well as the application of their proceeds, is controlled in Illinois. The proceeds are not segregated in application so as to be identified in any way with Ohio activities.

The elements necessary to create a business situs in Ohio are entirely absent in this case, the situation presented being precisely the converse of that which was before the United States Supreme Court in *Wheeling Steel Corp.* v. *Fox,* 298 U.S. 193 (1936). As applied to the State of *Illinois,* the facts are in all material respects substantially identical with those which the Supreme Court in the *Wheeling Steel* case held were sufficient to give rise to a business situs in West Virginia. *But with respect to the State of Ohio these facts are the precise opposite.* Despite the controlling decision of the Supreme Court of the United States in the *Wheeling Steel* case, the Supreme Court of Ohio in this case has reached a directly contrary holding upon substantially similar facts.

3. A statute imposing a tax upon property outside the territorial jurisdiction of the taxing power is repugnant to the due process clause of the Fourteenth Amendment of the United States Constitution.

The rule that property not within the territorial jurisdiction of the taxing power may not be subjected to tax therein is grounded primarily upon the provisions of Sec-

tion 1 of the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall "deprive any person of . . . property, without due process of law."

In *Delaware, Lackawanna and Western Railroad Company* v. *Pennsylvania*, 198 U. S. 341 (1905), the Supreme Court held unconstitutional a Pennsylvania property tax on capital stock represented in part by tangible personal property outside the state, saying at page 358:

> "The collection of a tax under such circumstances would amount to the taking of property without due process of law, and a citizen is protected from such taking by the Fourteenth Amendment."

And in the leading case of *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193 (1936), the court, speaking of the *ad valorem* property tax on intangibles involved in that case, said at pages 208-209:

> "We have held that it is essential to the validity of such a tax, under the due process clause, that the property shall be within the territorial jurisdiction of the taxing State. . . . We have said that the application to the States of the rule of due process arises from the fact 'that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution' . . ."

The court in that case held the accounts receivable of the taxpayer, a Delaware corporation, to have a business situs in West Virginia, and therefore subject to tax in that state, under facts precisely the reverse of the factual situation now before this Court with respect to the State of Ohio. As appellant's accounts receivable clearly have neither a domiciliary situs nor a business situs in Ohio the Legislature cannot constitutionally impose a property tax upon

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such intangibles for, in the words of the United States Supreme Court in *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S. 77 (1938), the Court will

> ". . . look to the State power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a State which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them but the due process clause denies to the State power to tax or regulate the corporation's property and activities elsewhere."

In the absence of a business situs in Ohio the State of Ohio may not constitutionally impose an *ad valorem* tax on appellant's accounts receivable, and if the Ohio statutes are so construed as to impose such a tax, they are unconstitutional under the due process clause of the Fourteenth Amendment of the Constitution of the United States.

B. Sections 5328-1 and 5328-2 of the General Code of Ohio as applied deny to appellant the equal protection of the laws contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

It is fundamental that under the Fourteenth Amendment a state may impose unequal taxation only where it is based upon a reasonable classification. In order to be "reasonable" such classification "must be based upon such real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis." *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 417 (1910).

There are certain well-established limitations on the power to classify for purposes of taxation, one of the most important of which is that a foreign corporation already admitted to do business in a state may not be subjected to a

different and more onerous method of taxation than domestic corporations similarly situated.

Southern Railway Co. v. *Greene*, 216 U. S. 400 (1910);
Hanover Fire Insurance Co. v. *Harding*, 272 U. S. 494 (1926);
Concordia Fire Insurance Co. v. *Illinois*, 292 U. S. 535 (1934);
Air-Way Corp. v. *Day*, 266 U. S. 71 (1924).

In *Southern Railway Co.* v. *Greene*, 216 U. S. 400 (1910), the Supreme Court held unconstitutional under the equal protection clause of the Fourteenth Amendment an Alabama tax imposed on foreign corporations only. The court said at page 418:

> "We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the Fourteenth Amendment, that such attempted taxation under a statute of the State, does violence to the Federal Constitution."

Similarly, in *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494 (1926), the court held unconstitutional as in violation of the equal protection clause of the federal constitution an Illinois tax on net receipts of foreign insurance companies based on a 100 per cent valuation whereas domestic insurance companies under local assessing practices were taxed on a 30 per cent valuation basis. It is worthy of note that in this case the statute itself was not discriminatory on its face, the inequality arising only because of local assessing practices under which the assessor uniformly debased valuations of domestic companies to 30

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per cent of the actual value. In so holding, the court said at page 516:

> ". . . an occupation tax imposed upon 100 per cent. of the net receipts of foreign insurance companies admitted to do business in Illinois, is a heavy discrimination in favor of domestic insurance companies of the same class and in the same business, which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent. of the full value of that property. It is a denial of the equal protection of the laws."

As construed and applied by the Supreme Court of Ohio, Sections 5328-1 and 5328-2 tax accounts receivable of appellant arising out of sales made by or through agents or representatives having offices outside of Ohio, merely because such sales are deemed to have been made from a "stock of goods" in Ohio. This denies appellant the equal protection of the laws contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States, in that under like circumstances a resident or domestic corporation is expressly exempted from tax by virtue of making the sales through agents or representatives having offices outside Ohio. As applied, the statutes tax the accounts receivable of appellant, a foreign corporation, in the event they result (a) from the sale of property sold by an agent having an office in Ohio, *or* (b) from a stock of goods maintained in Ohio; but expressly exempt from taxation the receivables of a *domestic* corporation in the event *either* of these criteria is found to exist outside the State of Ohio. The mere circumstance of residence or non-residence determines the question of exemption or taxability, resulting in an arbitrary discrimination against appellant in favor of resident or domestic corporations. This denies to appellant the equal protection of laws guaranteed to it by the Constitution of the United States.

Appellant respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal under Section 1257 of Title 28 of the United States Code.

Dated, this 23rd day of December, 1948.

CHARLES M. PRICE,
CLIFFORD C. PRATT,
JOSEPH A. DUBBS,
CLARENCE D. LAYLIN,
Attorneys for Appellant,
United States Gypsum Company.

SCOTT, MACLEISH & FALK,
EAGLESON & LAYLIN,
Of Counsel.

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EXHIBIT "A"

DEPARTMENT OF TAXATION OF OHIO

No. 1608

Nov. 17, 1944.

In the Matter of the Application of THE UNITED STATES GYPSUM COMPANY, (INTER-COUNTY), CHICAGO, ILLINOIS, for Review and Redetermination for the Years 1942 and 1943

The application of the United States Gypsum Company, (inter-county), Chicago, Illinois, for review and redetermination of additional intangible personal property tax assessments against such applicant for the years 1942 and 1943, after being duly heard, came on to be considered.

The Tax Commissioner, being fully advised in the premises, finds that part of the assessments complained of imposed an additional tax upon the applicant in that certain of its accounts receivable were given an Ohio situs for the purpose of computing its net taxable credits for the years here under consideration, whereas the applicant had not allocated any of its receivables into Ohio for such purpose.

The Tax Commissioner, being further advised in the premises, and in view of the decision of the Ohio Supreme Court in the case of Ransom & Randolph *v.* Evatt, 142 O. S. 398, and the reciprocal provisions contained in the last paragraph of Section 5328-2, General Code, finds that the assessment as heretofore made by this department with respect to the item of net taxable credits was in every respect proper.

The applicant at the time of said hearing contested the validity of such assessment with respect to allocating to Ohio certain of its accounts receivable on the grounds that the provisions of Section 5328-2, General Code, are not applicable and further that the construction of Sections 5328-1 and 5328-2, General Code, adopted by the Tax Commissioner, is in violation of the 14th amendment to the Constitution of the United States and the Constitution of the State of Ohio for, as construed, such sections operate to tax intangible property of a non-resident over which Ohio

has no jurisdiction and which has no business situs in Ohio. As to such contention, the Tax Commissioner holds that he is without authority to set aside acts of the legislature on constitutional grounds.

In addition to the foregoing contentions the applicant at the time of such hearing also raised the issue that the assessments were illegal and improper in that the accounts receivable which this department allocated to Ohio did not result from the sale of property from a stock of goods maintained in Ohio, as provided in Section 5328-2 of the General Code. It is the holding of the Tax Commissioner that the receivables, as heretofore allocated to Ohio, did result from the sale of property from a stock of goods maintained within this state and such contention is accordingly denied.

In view of the foregoing, it is, therefore, ordered by the Tax Commissioner that the application for review and redetermination be and the same is hereby denied.

DEPARTMENT OF TAXATION,
(S.) WILLIAM S. EVATT,
Tax Commissioner.

I hereby certify the foregoing to be a true and correct copy of the action of the Department of Taxation, this day taken by the Tax Commissioner with respect to the above matter.

(S.) WILLIAM S. EVATT,
Tax Commissioner.

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EXHIBIT "B"

BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT OF TAXATION OF OHIO

April 10, 1947.

No. 9569

UNITED STATES GYPSUM COMPANY, *Appellant*,

v.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO, *Appellee*

Entry

This cause came on for hearing upon an appeal from the final order of the tax commissioner denying an application for review and redetermination with respect to an additional intangible personal property tax assessment made by him against the appellant consisting of notes or accounts receivable for the years 1942 and 1943. This cause was heard and submitted upon the transcript of the proceedings before the tax commissioner, the stipulation of facts, the evidence and briefs of counsel.

From the stipulation of facts it appears that the appellant is an Illinois corporation with its principal office in Chicago and is engaged in the manufacture and sale of gypsum products and thirty other building materials. It and its wholly owned subsidiaries owned and operated thirty-eight plants in the United States and five in Canada, including five in Ohio, one of which located at Lancaster ceased operation May 6, 1942. The last mentioned plant manufactured paper products, all of which were furnished to other plants of the appellant.

All of appellant's corporate and business activities were conducted at the Chicago office where all meetings of directors, shareholders and executive and finance committees were held and all dividends were declared. All company records and general books and accounting records were kept at Chicago. The treasurer had custody of all money, securities, notes, etc. at that city. All pay roll checks were pre-

pared and signed at the Chicago office drawn on funds in Chicago and Ohio.

The stipulation of facts provides further as follows:

"The general sales office of the company is located at the Chicago office. All sales are managed, controlled and directed through divisional sales offices, and district sales offices which serve as headquarters for salesmen in relatively small areas. No Divisional Sales Manager resides or has an office in the State of Ohio.

"The district sales offices, each of which is in charge of a District Manager, have no control over sales policies, prices, credits or the employment or release of salesmen. Salesmen soliciting orders in the State of Ohio have their headquarters at one of four district sales offices, two being located in Ohio (at Cleveland and Cincinnati), one in Detroit, Michigan, and one in Pittsburgh, Pennsylvania.

"Orders taken by salesmen are subject to acceptance or rejection at the Chicago office and are taken upon order forms which state on the face that the order is 'subject to terms and conditions on back hereof which are hereby agreed to.' The terms and conditions on the back of the order form, including the copy of such order which is delivered to the customer for his records, contain the following provision:

" '7. It is further agreed that this written order and printed terms herein constitute the entire contract between the parties, that there are no verbal statements or agreements varying the same and that this order is subject to subsequent written acceptance by the United States Gypsum Co. at its principal office, Chicago, Illinois.'

"• • • All invoices for products sold to customers in Ohio, or shipped from Ohio plants, are prepared at and issued from the Chicago office, except in a few instances where shipments are invoiced from appellant's New York or Los Angeles offices, as the case may be. All such invoices for products sold to customers in

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Ohio, or shipped from Ohio plants, are posted in the accounts receivable ledgers of the company at the Chicago office, or at appellant's Los Angeles office with respect to shipments made to customers in that territory. All such accounts receivable are payable at the Chicago office or at other offices, none of which is within the State of Ohio. None of these accounts receivable are hypothecated, and no accounts receivable are paid to or collected by salesmen or any district office. Checks received in payment of such accounts receivable are deposited by the receiving office in various banks throughout the United States. All bank deposits are under the exclusive control of the Chicago office and moneys may be withdrawn therefrom only by checks signed by an officer of the company in the Chicago office for purposes authorized by action taken at the Chicago office. The avails of all accounts receivable are under the exclusive control of the Treasurer of appellant and are used and applied indiscriminately to the general purpose of appellant's business, whether in Ohio or elsewhere.

"Appellant's Credit Department is located at the Chicago office, with sub-offices in New York and Los Angeles, and controls all credits, and no products are shipped by or from any plant without credit approval from one of said offices.

"Appellant, for the years 1938 to 1943, both inclusive, filed its annual report as a foreign corporation for franchise tax purposes. Thereafter, the appellee examined appellant's books at appellant's Chicago office, and, with respect to each of said years it is stipulated and agreed that all adjustments made in said annual reports by the appellee, exclusive of the allocation of accounts receivable to the State of Ohio are correct; that for the purpose of this appeal, it is stipulated that as to each of said years 1938 to 1943, both inclusive, the accounts receivable allocated by the appellee to the State of Ohio represent all sales of appellant's products which were manufactured and shipped from its several plants in the State of Ohio to customers throughout the

United States and payment for which had not been made on the tax listing date for each of the years involved; that said accounts receivable arose out of sales to appellant's customers of products manufactured and shipped from appellant's several plants in the State of Ohio on orders solicited, received and filled as hereinbefore set forth; that the appellee subsequently denied the application of the appellant for review and correction of the determination made by the appellee."

The evidence shows that nearly all of the products, the sale of which resulted in the accounts receivable in question, were manufactured or put into their completed form after the orders therefor were accepted by the Chicago office and received at the plants in Ohio.

The only question presented is whether the tax commissioner erred in allocating to Ohio the accounts receivable which arose from sales of goods which were shipped from its plants in this State. In determining this question the Board is bound to follow the statutes applicable thereto, as construed by the Supreme Court. Section 5328-1, General Code, provides in part as follows:

"Property of the kinds and classes mentioned in section 5328-2 of the General Code, used in and arising out of business transacted in this state by, for or on behalf of a non-resident person, other than a foreign insurance company as defined in section 5414-8 of the General Code, and non-with-drawable shares of stock of financial institutions and dealers in intangibles located in this state shall be subject to taxation;"

It is clear that under this statute intangibles owned by a non-resident cannot be taxed unless they are both used in business in this State and arise out of business transacted here. Section 5325-1, General Code, reads in part as follows:

"Moneys, deposits, investments, accounts receivable and prepaid items, and other taxable intangibles shall be considered to be 'used' when they or the avails thereof are being applied, or are intended to be applied

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> in the conduct of the business, whether in this state or elsewhere. 'Business' includes all enterprises of whatsoever character conducted for gain, profit or income and extends to personal service occupations."

Since the avails of these accounts receivable were applied to the conduct of appellant's business generally, both in this State and elsewhere, they must be held to be used in business within the meaning of this statute. Ransom & Randolph Co. *v.* Evatt, 142 O. S. 398, 27 O. O. 348, 37 O. L. A. 481, 10 O. Supp. 25, 52 N. E. (2nd) 738; Haverfield Company *v.* Evatt, 143 O. S. 58, 28 O. O. 16, 54 N. E. (2d) 149.

We come now to section 5328-2, General Code, which provides, with reference to the situs of accounts receivable, as follows:

> "Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:
>
> "In the case of accounts receivable, when resulting from the sale of property sold by an agent having an office in such other state or from a stock of goods maintained therein, or from services performed by an officer, agent or employe connected with, sent from, or reporting to any officer or at any office located in such other state. • • •"

Said section also provides that:

> "The provisions of this section shall be reciprocally applied, to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed. It is hereby declared that the assignment of a business situs outside of this state to property of a person residing in this state in any case and under any circumstances mentioned in this section

> is inseparable from the assignment of such situs in this state to property of a person residing outside of this state in a like case and under similar circumstances."

This reciprocal provision indicates a policy to treat residents and nonresidents alike with respect to the taxation of intangibles used in business. In the above two cases no constitutional question was involved since the State would have the right to tax all the intangibles of its residents regardless of the business situs thereof. Under the above statutes, therefore, the rule adopted by the Supreme Court must be applied to nonresidents. It is claimed, however, that to apply this rule to nonresidents would render section 5328-2, General Code, unconstitutional. With respect to this claim it is sufficient to say that this Board has no right to declare a statute unconstitutional. Hillsborough Township *v.* Cromwell, 90 L. Ed. 298; Schwartz *v.* Essex County Board of Taxation, 129 N. J. L. 129, affirmed 130 N. J. L. 177. As stated before, the Board must be governed by the statutes relating to the taxation of intangibles as they have been construed by the Supreme Court. In the case of National Cash Register Company *v.* Evatt, 145 O. S. 597, 31 O. O. 218, 42 O. L. A. 545, 15 O. Supp. 144, 62 N. E. (2d) 327, the Court held that accounts receivable of the company, a Maryland corporation, which arose from sales made outside of Ohio of goods filled by shipment from its manufacturing plant in Ohio, were taxable in this State. The Court said:

> "We direct our attention first to the question whether the accounts receivable, arising from sales outside Ohio and filled from a stock of goods in Ohio, have an Ohio situs for purpose of taxation."

In referring to section 5328-2, General Code, the Court said:

> "Applying that section to the facts in the instant case, it means that accounts receivable belonging to a Maryland corporation, when resulting from sales of property by an agent having an office in Ohio or *from a stock of goods maintained in Ohio,* shall be considered to arise out of business transacted in Ohio."

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It is conceded that the accounts receivable did not result from the sale of property sold by any agents having offices in Ohio or from services performed by any officer, agent or employe connected with, sent from or reporting to any officer or at any office located in Ohio. The question, therefore, is whether these accounts receivable resulted from sales of property from a stock of goods maintained in Ohio.

The evidence shows that certain manufacturing or processing of the raw products, which were kept on hand at its Ohio plants in sufficient quantities to fill any orders that may be received, was necessary to convert them into the completed products ordered. This process took anywhere from approximately four minutes to less than one hour. The Board is of the opinion that it makes no difference whether the products were put into their completed form before or after the orders therefor were accepted and received. The evidence shows that the appellant did maintain in Ohio a stock of goods which was necessary to make the completed products sold by it. The same questions arose in the cases of National Distillers Products Corporation *v.* Glander, No. 11118 decided by this Board on March 12, 1947, and the case of Wheeling Steel Corporation *v.* Glander, No. 9681 decided by this Board April 7, 1947. Reference is hereby made to the entries in those cases and also to the case of National Distillers Products Corporation *v.* Glander, No. 9095 with reference to a franchise tax assessment decided on March 12, 1947.

For the foregoing reasons the Board finds that the accounts receivable in question resulted from sales of property from a stock of goods maintained in Ohio.

It is, therefore, considered and adjudged by the Board of Tax Appeals that the action of the tax commissioner herein complained of be, and the same hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the Department of Taxation, this day taken with respect to the above matter.

[SEAL.] EDWARD J. KIRWIN,
Secretary.

SUPREME COURT OF OHIO

No. 31081

UNITED STATES GYPSUM COMPANY, *Appellant*,

v.

WILLIAM S. EVATT, TAX COMMISSIONER OF OHIO, *Appellee*

Appeal from the Board of Tax Appeals

Certificate

On motion of appellant, UNITED STATES GYPSUM COMPANY, this court orders it to be certified and made a part of the record of the proceedings and the judgment of affirmance in this case that in its Notice of Appeal to this Court from the Board of Tax Appeals appellant drew in question the validity of Sections 5328-1 and 5328-2 of the General Code of Ohio, upon the ground that said statutory provisions, to the extent that they authorize or permit the accounts receivable of appellant to be taxed in Ohio as personal property, are unconstitutional in that they deprive appellant of its property without due process of law, and deny appellant the equal protection of the laws, all contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States; that the question of the validity of said statutory provisions as set forth in said Notice of Appeal was urged upon this Court in the briefs and arguments of counsel for appellant; that the determination of the constitutionality of said statutes was necessary to a decision of this case, and that upon consideration of the same this Court was of the opinion, and so decided, that said statutes are valid and not repugnant to the Constitution of the United States.

Witness, the Honorable, the Supreme Court of Ohio, this 10th day of November, 1948.

SUPREME COURT OF OHIO,
(Signed) CARL V. WEYGANDT,
Chief Justice of the
Supreme Court of Ohio.

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